

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT

10/25/2012

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
C. McCain
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

RULING

The Court has considered the State's Motion for Unredacted Copy of Expert's Notes filed July 31, 2012, the Defendant's Response: Motion for Unredacted Copies of Expert's Notes filed August 10, 2012, the State's Reply to Defendant's Response: Motion for Unredacted Copies of Expert's Notes filed August 15, 2012, the oral argument of counsel on September 24, 2012, Defendant's Memo Related to Redacted Notes filed under seal and the copies of the expert's notes, both redacted and unredacted. A copy of the redacted notes with bate stamp numbers has been provided to the State as agreed at the conference conducted on September 27, 2012.

The defendant has noticed her intention to call Alyce LaViolette, M.S., as an expert witness during the guilt phase. She has provided a redacted copy of Ms. LaViolette's notes to the State but objects to providing an unredacted copy on the grounds that the portions redacted constitute work product and are therefore non-discoverable. Defendant also contends the documents are privileged under A.R.S. § 13-4062. Defendant also argues providing the notes will provide the prosecutor with a preview of her case and will give the prosecutor advance notice of the weaknesses in the State's case or will identify evidence the State should present to sustain its burden of proof, citing *State v. Marshall*, 4 P.3d 1039, 1044, 197 Ariz., 492, 501 (App. 2000). Finally, Defendant claims disclosure of these notes will violate her rights under the 5th, 6th, 8th and 14th Amendments of the United States Constitution and Art. 2 §§ 4, 15, 23 and 24 of the Arizona Constitution.

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The Court has reviewed the redacted and unredacted copies of Ms. LaViolette's notes.

Rule 15.2(c)(2), Ariz.R.Crim.P., provides that a defendant shall provide the State with the names and addresses of experts expected to be called in the trial, along with the experts' reports. The underlying policy of discovery rules is to "facilitat[e] the search for the truth and prevent[] surprise." *State v. Roque*, 213 Ariz.193, 207, ¶ 33, 141 P.3d 368, 382 (2006). Rule 15.2(e)(2), Ariz.R.Crim.P., provides the defendant shall provide any completed written reports, statements and examination notes made by experts in connection with that case. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The expert must disclose all facts or data considered by them in reaching their conclusions. This includes facts or data, even that which was considered and rejected. Notes taken by an expert witness regarding interviews of witnesses or a defendant, or regarding testing, are information the expert has considered in forming an opinion. Such information is discoverable and may be delved into on cross examination. See Rules 703 and 705, Ariz.R.Evid. and *State v. Mauro*, 159 Ariz. 186, 199, 766 P.2d 59, 72 (1988).

Defendant contends some of Ms. LaViolette's notes should not be disclosed because they constitute work product. See Rule 15.4(b)(1), Ariz.R.Crim.P. The work product doctrine is not absolute and is waived if the party elects to present the expert as a witness. *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 193, 777 P.2d 686, 691 (1989). As noted, the defendant has noticed her intention to call Ms. LaViolette as an expert witness in the guilt phase. She has therefore waived the work product privilege and her right against self-incrimination with respect to work prepared by Ms. LaViolette. See *State v. Sucharew*, 205 Ariz. 16, 22, 66 P.3d 59, 65 (App. 2003).

The court finds the defendant failed to establish providing Ms. LaViolette's notes violate her rights under the 5th, 6th, 8th and 14th Amendments of the United States Constitution or Art. 2 §§ 4, 15, 23 and 24 of the Arizona Constitution.

The Court finds the redacted portions of the following documents are not work product. The court further finds the redacted portions of the following documents contain information provided to the expert and/or is information considered or rejected by the expert when forming her opinions or inferences and are thus discoverable. D-000021, D-000038, D-000046, D-000047, D-000049A, D-000049B, D-000049C, D-000054, D-000075, D-0000048, D-000049A, D-000069, D-000075, D-000110, D-000117, D-000118, D-000154, D-000158, D-000159, D-000161.

IT IS ORDERED granting the State's Motion for Unredacted Copy of Expert's Notes as to the following documents: D-000021, D-000038, D-000046, D-000047, D-000049A, D-000049B, D-000049C, D-000054, D-000075, D-0000048, D-000049A, D-000069, D-000075, D-000110, D-000117, D-000118, D-000154, D-000158, D-000159, D-000161.

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The court finds the redacted portions on the following documents do not contain information provided to the expert. The court further finds these redacted portions do not contain information considered and/or rejected by the expert when forming her opinions or inferences and are thus not discoverable. D-000020, D-000116, D-000119.

IT IS ORDERED denying the State's Motion for Unredacted Copy of Expert's Notes as to the following documents: D-000020, D-000116, D-000119.

IT IS FURTHER ORDERED Defense Counsel shall provide a copy of Ms. LaViolette's unredacted notes to the prosecutor as provided in this ruling.

FILED UNDER SEAL: Defendant's Memo Related to Redacted Notes, Redacted Notes and Unredacted Notes.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.